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NO. 03-16469-BB

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAR 14, 2005
THOMAS K. KAHN
CLERK

UNITED STATES OF AMERICA,

Appellee,

- versus -

MARTIN G. CHAMBERS,

Appellant.

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF FLORIDA**

**MOTION FOR REMAND FOR
RE-SENTENCING PURSUANT TO
United States v. Booker,
543 U.S. ___, 125 S.Ct. 738 (2005)**

COMES NOW the appellant Martin Chambers who seeks an order of this court remanding this matter for resentencing under the provisions of *United States v. Booker*, 543 U.S. ___, 125 S.Ct. 738 (2005).

This motion is made upon the following grounds:

1. Chambers was sentenced in the United States District Court for the Southern District of Florida, the Honorable Ursula Ungaro-Benages, presiding, on December 5, 2003. At that time, Chambers was sentenced to a term of incarceration of 188 months, the *bottom* of guideline level 36.¹

2. Chambers filed his Appellant's Opening Brief with this court on or about April 13, 2004.

3. Chambers was determined to have a final offense level 36. This included two points for role under U.S.S.G. §3B1.1(c); two points for obstruction of justice under U.S.S.G. §3C1.1; and two points for sophisticated laundering under U.S.S.G. §2S1.1(b)(3). In addition, although the amount of laundered funds was contained in the indictment, the jury made no finding, and was directed to make no finding regarding the exact amount of laundered funds. However, an additional 14 points under U.S.S.G. §2B1.1 were added. All these calculations were made by the district court, at the time of sentence, by a preponderance of the evidence.

¹ The calculations made by the district court were as follows:

1. Base offense level §2S1.1(a)(2) [including the value of the laundered funds as \$700,000]	22
2. Knowledge that the laundered funds were proceeds of drugs, §2S1.1(b)(1) and (a)(2)	+6
3. Conviction under 18 U.S.C. §1956, §2S1.1(b)(2)(B)	+2
4. Sophisticated laundering pursuant to U.S.C. §1.1(b)(3)	+2
5. Role in the offense, §3B1.1(c)	+2
6. Adjustment for obstruction of justice, §3C1.1	+2

4. The United States Supreme Court decided *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531 (2004) on June 24, 2004. *Blakely* applied *Apprendi v. New Jersey*, 530 U.S. 466 (2000) to enhancements to a sentence based upon facts not considered or found by a jury. For the court, the critical fact was that a judge may impose a sentence "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."

5. In response to *Blakely*, appellant filed with this court on July 2, 2004, a "Motion for Leave to Supplement Appellant's Opening Brief Under *Blakely v. Washington*".

6. The government opposed the filing of this brief by a pleading filed on or about July 19, 2004.

7. No ruling having been issued by the court regarding this motion, appellant filed his reply brief on July 22, 2004, and argued, in that reply brief, as Argument V that "The appellant must be re-sentenced because substantial upward adjustments were found against him in violation of *Blakely v. Washington*, 2004 W.L. 1402697 (June 24, 2004)".

8. The United States moved by motion filed August 2, 2004, to strike this argument from the reply brief. Chambers opposed the motion to strike in a pleading filed August 9, 2004. In that pleading, appellant noted that this Circuit in *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001) had specifically held that *Apprendi* only applied to sentencing facts "that increase the penalty for a crime beyond the prescribed statutory maximum.."

9. Appellant further noted in that filing that *Blakely* established a new rule of constitutional law which is required by the Supreme Court to be applied "to cases pending on

direct review". See *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987).

10. By order of September 2, 2004, this court denied the motion for leave to supplement the brief to raise issues concerning *Blakely v. Washington*, *supra*, and granted the government's motion to strike this argument from the Appellant's Reply Brief. The case was argued before this court on March 3, 2005.

11. On January 12, 2005, the United States Supreme Court decided *United States v. Booker*, 543 U.S. ___, 125 S. Ct. 738 (2005). In *Booker*, the court found no constitutionally significant difference between the federal guideline system and the system found unconstitutional in *Blakely*. In a majority opinion authored by Justice Stevens, the court concluded that the guidelines, as written, improperly permitted sentencing ranges to be adjusted upward by facts not considered by a jury, nor found beyond a reasonable doubt. A second majority opinion by Justice Breyer concluded that the constitutional defect of the guidelines was in their mandatory application, and found the guidelines to be advisory only.

12. The *Booker* court recognized that "we must apply today's holding – both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act – to all cases on direct review." 125 S. Ct. at 769. With regard to cases now on appeal, the court concluded that a "plain error" standard of review was to be applied. *Id.*

13. The standards for plain error are that there be: "(1) error, (2) that is plain, and (3) that affects substantial rights." *United States v. Cotton*, 535 U.S. 625, 631 (2002).

14. This court, in *United States v. Rodriguez*, ___ F.3d ___, No. 04-12676 (11th Cir. February 4, 2005) recognized that, in cases such as this, the "first prong of the plain error test is satisfied" because the appellant's "sentence was enhanced as a result of findings made by the judge that went beyond the facts admitted by the defendant or found by jury."

15. This court also recognized in *Rodriguez*, that the "second prong" of the plain error test is also met because, after *Booker* "the error is now plain".

16. This court has adopted in *Rodriguez*, however, a formulation of the "affects substantial rights" portion of the plain error test which is improper, and is at odds with decisions of other Circuits which have ruled on this issue.

17. Specifically, this court has concluded that the error is not the finding of extra verdict enhancements, but rather only in the "mandatory nature of the guidelines once the guideline range has been determined". See also *United States v. Duncan*, ___ F.3d ___, No. 03-15315 (11th Cir., February 24, 2005).

18. This formulation of the plain error test is erroneous for the following reasons:

a. It is clear, to paraphrase the decision of the Ninth Circuit in *United States v. Ameline*, ___ F.3d ___, No. 02-30326 (9th Cir., February 9, 2005):

"There can be little doubt that the constitutional error in sentencing [appellant] affected [appellant's] substantial rights. [Appellant] was deprived of his right to have a jury find beyond a reasonable doubt [the existence of

the enhancing facts].”

b. This court has recognized, in *Duncan*, that decisions in the Fourth, Sixth and Ninth Circuits find plain error under the circumstances described in this case. See *United States v. Ameline*, *supra*; *United States v. Oliver*, ___ F.3d ___, 2005 W.L. 233779 (6th Cir. February 2, 2005); *United States v. Hughes*, ___ F.3d ___, 2005 W.L. 147059 (4th Cir. January 24, 2005).

c. Even though [sic] the guidelines are now advisory only, it is submitted that after *Booker* each of the enhancements must still be proved beyond a reasonable doubt or be admitted by the defendant. Thus, although advisory, the advice given to the district court by the guidelines is unconstitutional and fatally flawed, because the advisory range has been established in an unconstitutional manner. Regardless of the formation of the third prong of the plain error test, the substantial rights of Chambers have been affected by the improper calculations of substantial enhancements which have had an overwhelming affect on his sentence.

d. The formulation adopted by this Circuit has unconstitutionally deprived appellants of their right to the application of *Booker* as explained in *Booker* and *Blakely*. The court has, in effect, established a hurdle to application of these cases for appellants on direct appeal which, under the court's analysis, would effectively, and unconstitutionally, withdraw the salutary effect of the decision to appellants such as Chambers.

e. Violation of the *Booker* decision, which imposes a substantive charge, constitutes structural error that excuses a harmless error analysis. See *Arizona v. Fulminate*, 499 U.S. 279 (1991).

f. In this case, the record substantiates the notion that the district court would have entered a lesser sentence, had it been available.

(i) First, the district court followed recommendations of the probation report to the letter. That report, as noted by the district court requested a sentencing range of 188-235 months, which was found by the district court. Transcript December 5, 2003, page 9.

(ii) Despite the fact that the government urged a sentence of 200 months, the court sentenced Chambers to the low end of the guideline range. In doing so, the court noted the defendant's age. Thus, unlike a situation in which a defendant is sentenced to the mid or upper portion of a range, the court here selected the *lowest* sentence available to it, after acceptance of each of the guideline characteristics suggested by the PSIR.

19. Appellant Martin Chambers is incarcerated pursuant to the sentence of the district court.

20. Based upon the foregoing, the defendant respectfully suggests that he is entitled to a re-sentencing before the district court at which the principles of *United States v. Booker*, *supra*, will be followed.

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DATED: March 10, 2005

Respectfully submitted,

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/s/ DONALD M. RÉ
DONALD M. RÉ
Attorney for Appellant
MARTIN G. CHAMBERS

(Certificate of Service and Certificate of Interested Persons
have been omitted.)